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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 98

ELI GURMAN, PETITIONER

v.

FREDERICK ILLG, AND CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

BRIEF FOR THE PRICE ADMINISTRATOR IN OPPOSITION

OPINIONS BELOW

The memoranda of the Court of Common Pleas for New Haven County, Connecticut (R. 11, 13–15) are not reported. The opinion of the Supreme Court of Errors of the State of Connecticut (R. 22–27) has not yet been reported.

JURISDICTION

The judgment of the Supreme Court of Errors of the State of Connecticut, Third Judicial District, was entered on May 2, 1945 (R. 28). The petition for a writ of certiorari was filed on May

28, 1945. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 205 (e) of the Emergency Price Control Act of 1942, before its amendment, entitled a tenant, in a single action, to recover from his landlord not less than $50 for each weekly payment of rent in excess of the legal maximum.

2. Whether, if construed to permit such recovery, the Section is constitutional.

3. Whether the amendment to Section 205 (e), effected by the Stabilization Extension Act of 1944, applies to this suit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out in the Appendix, *infra*, pp. 12–15.

STATEMENT

The facts, as found by the judge of the Court of Common Pleas for New Haven County (R. 15–18) are, in substance, as follows:

Petitioner rented a room in the New Haven Defense Rental Area to the respondent Illg, on a week to week basis and for an indefinite period, at a weekly rental of $5.00 (R. 16). During the period from August 1, 1942, to April 24, 1943,

inclusive, petitioner demanded and received from Illg thirty-eight separate payments of $5.00 each as weekly rental for the room (R. 17). Under the Rent Regulation for Hotels and Rooming Houses (R. 6–7, 8 F. R. 14663), issued under Section 2b of the Emergency Price Control Act, the maximum rent for the room was $4.00, that being the highest amount for which the room was rented during the thirty days ending April 1, 1941 (R. 16).

Illg brought this suit in the Court of Common Pleas for New Haven County, Connecticut, to recover damages from the petitioner under Section 205 (e) of the Emergency Price Control Act of 1942. Pursuant to Section 205 (d) of the Act, the Price Administrator was permitted to intervene in the action (R. 8). The Court of Common Pleas granted judgment in favor of Illg against petitioner for $1,900, this being $50 for each of the thirty-eight payments (R. 11), and the Supreme Court of Errors affirmed the judgment (R. 28).

ARGUMENT

The Supreme Court of Errors held that Section 205 (e) entitled a tenant to recover from his landlord not less than $50.00 for each payment of rent in excess of the legal maximum, that the Section was constitutional, and that the amendment to the Section effected by the Stabilization Extension Act of 1944 was not retroactive. The decision is correct and is in accord with the deci-

sions of all federal circuit courts of appeals and all state courts of last resort which have passed on the matter.

1. The Court below correctly construed Section 205 (e). The first sentence of Section 205 (e), as it read before its amendment on June 30, 1944, provided (see Appendix, *infra*, p. 12):

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court.

The second sentence read:

> For the purpose of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be.

The Section, therefore, insofar as rents are concerned, is to be construed as though it read as follows:

> If any person *receiving rent* for defense-area housing accommodations violates a regulation * * * etc., the person who pays the rent for such defense-area housing

> accommodations may bring an action for $50 or for treble the amount by which the consideration exceeded the applicable maximum rent plus reasonable attorney's fees and costs as determined by the court.

So read, Section 205 (e) clearly gives to a tenant a cause of action for not less than $50 for each payment of rent in excess of the legal maximum. *Lambur* v. *Yates*, 148 F. 2d 137 (C. C. A. 8); *Thierry* v. *Gilbert*, 147 F. 2d 603 (C. C. A. 1); *Desper* v. *Warner Holding Co.*, Supreme Court of Minnesota, decided May 4, 1945;[1] *Regan* v. *Kroger Grocery & Baking Co.*, 54 N. E. 2d 210 (Sup. Ct. Ill.).

Where the rent is paid at intervals for stated periods of time, it is wholly immaterial whether the premises for which the rent is paid be regarded as having been let but once for one entire term, or as having been let successively for each of the periods for which the rent is paid, because it is the receipt of rent in violation of a regulation and not the letting of the premises that gives

[1] In the *Desper* case, the Supreme Court of Minnesota said:

> The law is well established that a tenant charged in excess of the maximum permitted under the regulation is entitled to a separate cause of action and claim for each monthly violation of such regulation where the lease calls for monthly payments of rentals in advance, notwithstanding the fact that he rents under a yearly lease. It is true there are a few authorities to the contrary on this point, but the majority of courts have held in accordance with the foregoing.

A copy of the opinion in this case has been lodged with the Clerk of this Court.

rise to the cause of action. In the case of commodities the basis of the cause of action is different. There it is the sale of a commodity in violation of a regulation and not the receipt of the price that gives rise to the cause of action. This distinction is made not only by Section 205 (e) but also by Section 4 (a) of the Act. That Section makes it unlawful "*to sell or deliver any commodity* * * * or *to demand or receive any rent* for any defense-area housing accommodations * * * in violation of any regulation * * *" [italics supplied]. The two Sections are in *pari materia* and should be read together. When they are so read, there can be no doubt that each receipt of rent in excess of the legal maximum gives rise to a separate cause of action. Since the regulation establishes a ceiling on the basis of weekly rentals (R. 7), each payment is as distinct from the other as the theft of mail from separate bags in a post office, *Ebeling* v. *Morgan*, 237 U. S. 625, or the sale on consecutive days of narcotics by the same seller to the same purchaser. *Blockburger* v. *United States*, 284 U. S. 299.

Nor is it at all material whether the tenant brings a separate action for each overcharge or one action for several overcharges. The expression "may bring an action * * * for $50," in Section 205 (e), operates to fix the minimum amount which a tenant or consumer may recover on any one cause of action, and not the maximum amount

of liquidated damages which he may recover in any one suit in which more than one cause of action is stated. It would be absurd to construe this provision as permitting a recovery of more than $50, as liquidated damages, in a multiplicity of suits, but not permitting such recovery in one suit based on the same series of overcharges. That such a construction was not anticipated is clearly shown by the legislative history of the amendment to Section 205 (e), effected by the Stabilization Extension Act of 1944 (Appendix, *infra*, pp. 13–14).[2] Explaining the amendment and the reasons for its adoption, the Senate Committee on Banking and Currency said (S. Rep. No. 922, 78th Cong., 2d Sess. pp. 13–14):

> Section 108 of the bill amends subsection (e) of section 205 of the Emergency Price Control Act. * * * For example, if a roomer who pays his rent by the day is overcharged 50 cents a day for 10 days, he is entitled under the present law to recover $500 from his landlord even though the aggregate amount of the overcharges is only $5.
>
> This bill amends the present law with respect to the amount of damages which may be recovered in actions under this subsection. With respect to the $50 minimum, it is provided that the purchaser may recover only

[2] Subsequent legislation may be considered to assist in the interpretation of prior legislation on the same subject. *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277; *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309.

> one $50 for all of the overcharges which he has paid to a given seller prior to the bringing of the suit.

Similar statements were made by the House Committee on Banking and Currency (H. Rep. No. 1593, 78th Cong., 2d Sess. p. 8) and in the Conference Report (H. Rep. No. 1698, 78th Cong. 2d Sess. p. 23).

2. In allowing a separate recovery of $50 for each overcharge, Section 205 (e) does not violate any right guaranteed by either the Fifth or Eighth Amendments (Appendix, *infra*, p. 12). The imposition of a separate liability for each repetition of a wrongful act is not uncommon. Compare, *United States* ex rel. *Marcus* v. *Hess*, 317 U. S. 537; *Ebeling* v. *Morgan*, 237 U. S. 625; *Blockburger* v. *United States*, 284 U. S. 299. Concededly, in certain circumstances, the requirements of due process forbid the imposition of cumulative liabilities for the violation of a statute or administrative order pending an attempt to test the validity of the statute or order in the courts and for a reasonable time thereafter. *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 310. But that principle has no application where administrative relief has not been sought and where, as here (*Yakus* v. *United States*, 321 U. S. 414), an adequate procedure for judicial review is provided and the defendant fails to avail himself of it. *St. Louis I. Mt. & So. Ry Co.* v. *Williams*, 251 U. S. 63, 65;

Wadley Southern Ry. Co. v. *Georgia,* 235 U. S. 651; *Gulf C. etc. Ry. Co.* v. *Texas,* 246 U. S. 58.

It may also be conceded that a statute imposing penalties may be unconstitutional under the Eighth Amendment if the penalties are so disproportionate to the offense as to be excessive. But in cases such as this, the validity of the statute is not to be tested by contrasting the penalty with the amount of the overcharge but by the public interest in having the statute obeyed and the relation of the penalty to that object. *St. Louis I. Mt. & So. Ry.* v. *Williams,* 251 U. S. 63, 67. When tested by that standard, the liability imposed by Section 205 (e), even if it could be classed as a fine within the meaning of the Eighth Amendment, cannot be said to be excessive. Compare, *Gulf C. etc. Ry. Co.* v. *Texas,* 246 U. S. 58, where this Court upheld a fine of $22,400 for 224 successive failures of a railroad to stop its trains at a county seat as required by an order of the Texas Railway Commission. Petitioner labors the point that the liability imposed by Section 205 (e) may run into astronomical figures. A sufficient answer to that argument, based as it is on pure speculation and conjecture, is that actual experience has shown it to be without foundation. The time within which a suit might be brought for $50 for each overcharge expired on June 30, 1945, and although Section 205 (d) of the Act requires all courts to notify the Price Administrator of any and all ac-

tions brought under the Act, no action has come to the attention of the Price Administrator in which a recovery has been allowed (based solely on the $50 minimum provision of the statute) for an amount in excess of the fine which might properly be imposed for a single violation under the criminal provisions of Section 205 (b) of the Act. Furthermore, while the good faith of the defendant was not a defense to an action brought under Section 205 (e) as it read before its amendment, the legislative history of the Act shows that Congress intended that the bad faith of the plaintiff should bar a recovery.[3] The Section could not, therefore, become an instrument of abuse.

3. The amendments to Section 205 (e), effected by the Stabilization Extension Act of 1944, clearly do not apply to this action. Section 108 (c) (Appendix, *infra*, p. 15) of the Stabilization Extension Act expressly provides that the amendments, insofar as actions brought by consumers or tenants are concerned, should apply only with respect to violations thereafter occurring. *Thierry* v. *Gilbert*, 147 F. 2d 603, 605 (C. C. A. 1).

4. There is no conflict between the decision of the court below and the decision of any other state court of last resort, or the decision of any federal circuit court of appeals. There are a number of federal district court decisions, as well as a number of lower state court decisions, which

[3] See S. Rep. No. 931, 77th Cong., 2d Sess., pp. 9–10.

are in conflict with the decision sought to be reviewed (Br. 16–17), but they were all decided before any federal circuit court of appeals had passed upon the matter. See cases cited *supra*, p. 5.

CONCLUSION

The decision of the court below is plainly right and no reason exists which would justify its being reviewed by this court.

Respectfully submitted,

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JULY 1945.